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FELONS, FIREARMS, AND FEDERALISM: RECONSIDERING SCARBOROUGH IN LIGHT OF LOPEZ

Brent E. Newton*

I. INTRODUCTION

The United States Supreme Court's decision in *United States v. Lopez*¹ suggested a dramatic shift in the Court's² view of the Congressional power to criminalize conduct primarily local in nature. *Lopez* has contributed to an ongoing dialogue within the academic community, and on the bench, regarding the future of federalism.³ Unfortunately, as is often the case, the Supreme Court's new perspective has not necessarily resulted in a clean break with tradition, leaving lower federal courts to engage in the complex process of reconsidering the impact of new precedent on older doctrines. *Lopez* raises questions, for example, about the continuing viability of the Court's prior decision in *Scarborough v. United States*,⁴ which addressed Congress's power to outlaw the possession of firearms by felons.

As Professor Robert Justin Lipkin has observed, lower federal courts serve important roles in both the development and implementation of constitutional doctrine.⁵ Characterizing

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1. 514 U.S. 549 (1995).

2. The majority opinion in *Lopez* was written by Rehnquist, C.J., joined by O'Connor, Scalia, Kennedy, & Thomas, JJ.

3. See e.g. Steve France, *Laying the Groundwork*, 86 ABA J. 40 (May 2000).

4. 431 U.S. 563 (1977).

5. See Robert Justin Lipkin, *Constitutional Revolutions: A New Look at Lower Court Appellate Review in American Constitutionalism*, 3 J. App. Prac. & Process 1 (2001).

dramatic shifts in constitutional interpretation as often being “revolutionary,” Professor Lipkin has suggested that *Lopez* has the characteristics of a revolutionary decision, dramatically influencing our understanding of limitations on congressional power to criminalize local conduct through the traditional rationale of regulation of interstate commerce.⁶

The post-*Lopez* litigation history demonstrates, however, that such revolutionary decisions rendered by the Supreme Court are not so clean in their application. Lower federal courts are confronted with new thinking from the Supreme Court, while working within the confines of pre-existing precedent not expressly overruled by the Court. This situation has been reflected in considerable judicial debate over whether *Lopez* requires scrutiny of the continuing viability of pre-*Lopez* federal statutes enacted pursuant to the Commerce Clause. Perhaps most typical of the problem has been the continuing viability of the federal statute criminalizing possession of firearms by felons, 18 U.S.C. § 922(g).⁷

Prosecutions under § 922(g) are burgeoning. Highly publicized and well-funded government programs, such as “Project Exile,” have resulted in many thousands of such federal prosecutions.⁸ Under federal criminal law provisions, even a person with a single prior felony conviction—including a conviction for a non-violent crime such as theft or mere possession of drugs for personal use, and even if his prior conviction occurred decades ago—faces up to ten years in prison without the possibility of parole if convicted.⁹ If such persons have three or more prior convictions for violent offenses or drug-trafficking crimes, they face a minimum mandatory prison sentence of fifteen years without parole with the

6. *Id.* at 22-23.

7. That statute provides:

It shall be unlawful for any person . . . who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year [*i.e.*, a felony] . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 922(g)(1) (1994).

8. Gary Fields, *Ashcroft Aims to Step Up Efforts to Curb Illegal-Firearm Possessions*, Wall St. J. A16 (July 3, 2001).

9. See 18 U.S.C. § 924(a)(2) (1994).

possibility of a sentence of life in prison.¹⁰ Such federal prosecutions are burgeoning, notwithstanding the existence of penal laws in virtually every state that criminalize the possession of firearms by felons and a tradition in this country of state and local regulation of such matters.¹¹

Relying on the Supreme Court's expansive interpretation of the federal statute in *Scarborough* that prohibits felons from possessing firearms that are "in or affecting" interstate commerce,¹² federal prosecutors around the country are prosecuting felons whose possession of a firearm was entirely a local event. Most such prosecutions have no meaningful connection to interstate commerce. The typical prosecution is based on proof that a person with a felony record simply possessed a firearm on his person or in his vehicle.¹³ Many prosecutions have been of felons who pawned firearms for money at a local pawn shop,¹⁴ used firearms to hunt,¹⁵ or possessed firearms for self-protection.¹⁶ The only "nexus" to interstate commerce in most such cases is the simple fact that a felon happened to possess a firearm that was manufactured in another state and, thus, that necessarily had crossed states lines at some point in the past.

As discussed below, the prevailing interpretation of 18 U.S.C. § 922(g)—and the sweeping dragnet of federal prosecutions spawned by it—far exceeds Congress's authority to regulate firearms under the Commerce Clause of the United States Constitution and is at odds with this country's system of federalism.

10. See 18 U.S.C. § 924(e) (1994).

11. The Supreme Court has recognized that penal laws that prohibit felons from possessing firearms are within a traditional area of state or local concern. *U.S. v. Bass*, 404 U.S. 336, 349-50 (1971).

12. *Scarborough*, 431 U.S. 563.

13. The author has handled approximately fifty such cases as a defense attorney. He has never handled—or even heard of—a § 922(g) prosecution in which a felon actually crossed state lines while in possession of a firearm or acquired a firearm from out of state.

14. See e.g. *U.S. v. Reynolds*, 215 F.3d 1210, 1212 (11th Cir. 2000) (per curiam).

15. See e.g. *U.S. v. Bates*, 77 F.3d 1101, 1103 (8th Cir. 1996).

16. See e.g. *U.S. v. Rice*, 214 F.3d 1295, 1296-98 (11th Cir. 2000).

II. THE IRRECONCILABLE CONFLICT BETWEEN *SCARBOROUGH* AND *LOPEZ*

In *Scarborough v. United States*,¹⁷ the Supreme Court held that a conviction under 18 U.S.C. § 1202(a)¹⁸—the statutory predecessor of 18 U.S.C. § 922(g)—only required proof that a particular firearm was manufactured outside of the state in which a felon possessed it in order to satisfy the jurisdictional¹⁹ “interstate commerce” element of the statute. The Court in *Scarborough* rejected the defendant’s argument that a contemporaneous “nexus” with interstate commerce was required; any past connection, however remote in time, was deemed sufficient.²⁰ Justice Thurgood Marshall’s opinion for the Court in *Scarborough* was written during the era when the Supreme Court was broadly interpreting Congress’s authority to outlaw criminal conduct pursuant to its interstate commerce regulatory power under Article 1, section 8, clause 3 of the United States Constitution.²¹

In 1986, Congress recodified section 1202(a) as 18 U.S.C. § 922(g)(1).²² In addition to prohibiting felons from possessing firearms (or ammunition for firearms) that were “in or affecting” interstate or foreign commerce, the recodified statute also prohibited other classes of presumptively dangerous persons from possessing such firearms.²³

17. 431 U.S. 563 (1977).

18. That statute provided: “Any person who . . . has been convicted . . . of a felony . . . and who receives, possesses, or transports in commerce or affecting commerce . . . any firearm shall be fined not more than \$10,000 or imprisoned for not more than two years, or both.” 18 U.S.C. App. § 1202(a)(1) (repealed 1986). See 18 U.S.C. App. § 1202 (Supp. IV 1986).

19. The commerce element has been treated as a “jurisdictional” element because 18 U.S.C. § 1202(a)—like its statutory successor, 18 U.S.C. § 922(g)(1)—was enacted pursuant to Congress’s authority to regulate interstate commerce under Article 1, section 8, clause 3 of the United States Constitution. That is, the “interstate commerce” element provides federal jurisdiction over a felon who possesses a firearm. See e.g. *U.S. v. Dupree*, 258 F.3d 1258, 1259 (11th Cir. 2001).

20. *Scarborough*, 431 U.S. at 569-77.

21. See e.g. *Perez v. U.S.*, 402 U.S. 146 (1971) (upholding congressional power under the Commerce Clause to regulate local loan sharking because of the overall effect of organized crime on interstate commerce).

22. Section 922(g)(1) was first codified at 18 U.S.C. § 922(g)(1) (Supp. IV 1986).

23. In addition to prohibiting felons from possessing firearms, section 922(g) also applies to other classes of prohibited persons, such as illegal aliens and persons

In *United States v. Lopez*,²⁴ the Supreme Court, by a five-to-four vote, significantly retreated from the Court's prior expansive interpretation of Congress's regulatory power under the Commerce Clause in criminal law matters and breathed new life into the traditional approach to our nation's system of federalism. In *Lopez*, the Court invalidated the Gun-Free School Zones Act of 1990²⁵ as being beyond Congress's authority.²⁶ The Court began its analysis by surveying over a century of its Commerce Clause jurisprudence and derived from that jurisprudence three "broad categories" of activity Congress may constitutionally regulate:

[W]e have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things [actually] in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.²⁷

In assessing the constitutionality of the Gun-Free School Zones Act of 1990, the Court subsequently concluded:

[Section] 922(q) is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of interstate commerce; nor can § 922(q) be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce. *Thus, if § 922(q) is to be sustained, it must be under the third category as a*

dishonorably discharged from the military. See 18 U.S.C. § 922(g)(1)–(9). The vast majority of prosecutions under § 922(g) are of felons.

24. 514 U.S. 549 (1995).

25. The Gun-Free School Zones Act of 1990 was codified at 18 U.S.C. § 922(q)(1)(A) (Supp. II 1990). That statute forbade "'any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.'" *Lopez*, 514 U.S. at 551 (quoting 18 U.S.C. § 922(q)(1)(A)).

26. *Lopez*, 514 U.S. at 558.

27. *Id.* at 559 (citations omitted).

*regulation of an activity that substantially affects interstate commerce.*²⁸

The Court then considered whether Congress had the power under the third species of its Commerce Clause authority to enact § 922(q). In holding § 922(q) to be an improper exercise of Congress's power, the Court held:

Section 922(q) is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.²⁹

In the immediate wake of *Lopez*, criminal defendants convicted under 18 U.S.C. § 922(g) challenged *Scarborough's* interpretation of what type of interstate commerce "nexus" is required under 18 U.S.C. § 922(g)(1). Defendants contended that section 922(g), like the firearms statute in *Lopez*, must be analyzed as an attempt by Congress to exercise its authority under the "third category" of commerce regulation identified in *Lopez*. Engaging such an analysis, the defendants contended that *Lopez* unquestionably established that mere *intrastate* firearm possession was not a "commercial" or "economic" activity and further contended that the mere fact that a firearm had crossed state lines at some point in the past, however remote, did not constitute a "substantial" effect on interstate commerce as required by *Lopez* for "third category" exertions of commerce regulation.³⁰

Although no federal court of appeals has held that *Lopez* trumped *Scarborough*,³¹ numerous federal court of appeals judges, in dissenting and concurring opinions, contended in a

28. *Id.* (emphasis added).

29. *Id.* at 561.

30. See e.g. *U.S. v. Rawls*, 85 F.3d 240 (5th Cir. 1996) (per curiam).

31. Every circuit court to have addressed the issue has held that *Scarborough* has survived *Lopez* in terms of its precedential value in the lower federal courts. See *U.S. v. Dorris*, 236 F.3d 582, 586 & n. 1 (10th Cir. 2000) (collecting cases).

persuasive manner that *Scarborough*'s broad interpretation of the commerce "nexus" logically did not survive *Lopez*.³² Fifth Circuit Court of Appeals Judge Will Garwood—the author of the Fifth Circuit's 1993 decision in *Lopez* that was affirmed by the Supreme Court in its landmark decision in 1995³³—cogently stated that "one might well wonder how it could rationally be concluded that mere possession of a firearm in any meaningful way concerns interstate commerce simply because the firearm had, perhaps decades previously before the charged possessor was even born, fortuitously traveled in interstate commerce."³⁴

Remarkably, a total of twelve members of the Fifth Circuit eventually opined, or at least strongly suggested, that *Scarborough*'s broad reading of the interstate commerce "nexus" element is inconsistent with *Lopez*'s more restrictive interpretation of the federal government's powers under the Commerce Clause.³⁵ Nevertheless, the Fifth Circuit has stated that, as an intermediate federal appellate court, it has no authority to overrule *Scarborough* in light of *Lopez* and that such action could only be taken by the Supreme Court itself.³⁶

32. See e.g. *U.S. v. Kuban*, 94 F.3d 971, 976-79 (5th Cir. 1996) (DeMoss, J., dissenting in part); *U.S. v. Chesney*, 86 F.3d 564, 574-82 (6th Cir. 1996) (Batchelder, J., concurring).

33. *U.S. v. Lopez*, 2 F.3d 1342 (5th Cir. 1993), *aff'd*, 514 U.S. 549 (1995).

34. *Rawls*, 85 F.3d at 243 (Garwood, J., specially concurring, joined by Wiener & E. Garza, JJ.).

35. See *U.S. v. Kirk*, 105 F.3d 997, 1004 (5th Cir. 1997) (per curiam) (Higginbotham, J., concurring, joined by Politz, C.J. & Davis & Wiener, JJ.); *id.* at 1005-16 (Jones, J., dissenting, joined by Garwood, Jolly, Smith, Duhe, Barksdale, E. Garza, & DeMoss, JJ.).

36. *Rawls*, 85 F.3d 240; *Kirk*, 105 F.3d at 1015 n. 25. The Fifth Circuit's belief that *Scarborough* forecloses lower federal courts from addressing constitutional issues regarding 18 U.S.C. § 922(g) is, however, mistaken. The constitutional issue of whether Congress exceeded its authority under the Commerce Clause was not raised in *Scarborough* and was not decided by the Court. The briefs filed in *Scarborough* demonstrate that the parties in that 1977 appeal were in agreement that Congress possessed the authority under the Commerce Clause to penalize a felon's mere possession of a firearm that had traveled interstate at some point in the past; the only issue in dispute was whether the statutory predecessor to § 922(g)(1), 18 U.S.C. § 1202(a), could be fairly interpreted to be an expression of such a sweeping power. See Br. for Pet., at 23-24, *Scarborough v. U.S.*, 431 U.S. 563 (1977) ("Congress has the power to confer federal authority to prosecute crimes previously in the state domain [including a felon's possession of a firearm], and even eliminate the requirement of proof that a particular transaction has a specific connection with interstate commerce."); Br. for U.S., at 10, *Scarborough v. U.S.*, 431 U.S. 563 (1977) ("There can be no doubt about the power of Congress under the Commerce Clause to prohibit felons from possessing firearms that have moved in commerce. . . . The only issue in this case . . . is whether Congress in fact exercised its broad power over commerce to prohibit possession of firearms that have moved in

Despite such unrest in the lower courts and the clear conflict between *Scarborough* and *Lopez*, the Supreme Court has denied certiorari in every case to date in which defendants sought to have the Court overrule *Scarborough* in view of *Lopez*.³⁷

III. THE FURTHER DISINTEGRATION OF *SCARBOROUGH*: *JONES AND MORRISON*

In 2000, the Supreme Court rendered decisions in two more cases that set further limits on Congress's authority to regulate criminal conduct under the Commerce Clause.

In *Jones v. United States*,³⁸ the Supreme Court, applying the "constitutional doubt" doctrine of statutory construction,³⁹ strongly suggested⁴⁰ that the federal arson statute⁴¹ could not

commerce when it prohibited possession 'affecting' commerce."). Thus, the parties in *Scarborough* did not "join issue" regarding whether the felon-in-possession statute would operate unconstitutionally in a case where the only interstate commerce nexus was the fact that a firearm had traveled interstate some time in the past, even if that interstate movement was long before a felon's possession of the weapon.

Consequently, the Supreme Court's opinion in *Scarborough* did not address the threshold constitutional issue. After engaging in an extensive statutory-construction analysis and review of relevant legislative history, the Supreme Court concluded that "we see no indication that Congress intended to require any more than the minimal nexus that the firearm ha[d] been, at some time, in interstate commerce. . . . Congress sought to reach possessions broadly, with little concern for when the nexus with commerce occurred. . . . [T]here is no question that Congress intended no more than a minimal nexus requirement." *Scarborough*, 431 U.S. at 575, 577. Thus, the only issue decided in *Scarborough* was Congress's intent—not whether Congress's expression of that intent, in the felon-in-possession statute, was unconstitutional. The latter issue was not decided by the Supreme Court. At most, *Scarborough* contains what the Supreme Court has characterized as a "*sub silentio*" holding on the Commerce Clause constitutionality issue. However, it is well established that such *sub silentio* holdings—that is, "unstated assumptions on non-litigated issues"—have no precedential value. See e.g. *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 182-83 (1979).

37. See e.g. *Chesney v. U.S.*, 520 U.S. 1282 (1997) (denying certiorari); *Kuban v. U.S.*, 519 U.S. 1070 (1997) (denying certiorari).

38. 529 U.S. 848 (2000).

39. That doctrine provides that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Supreme Court's] duty is to adopt the latter." *Id.* at 857 (citations and internal quotation marks omitted).

40. The Court's own "question presented" posed to the parties in *Jones* made it clear that the Court was considering invalidating the federal arson statute (on constitutional grounds) as applied to private residences. See *Jones v. U.S.*, 528 U.S. 1002, 1002 (1999) (limiting the petition for writ of certiorari to the question of "whether its application to the

constitutionally be construed to cover the arson of a private residence based on the mere fact that the residence was constructed with supplies that had moved in interstate commerce at some point in the past.⁴²

The Court's response to the Government's proposal that the federal arson statute should be applied to private residences based on a "minimal [interstate commerce] nexus" interpretation of the statute—that is, where components of a building previously had traveled in interstate commerce—is telling. In rejecting this proposal, the Court in *Jones* stated:

Were we to adopt the Government's expansive interpretation of § 844(i), hardly a building in the land would fall outside the statute's domain. Practically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce, served by utilities that have an interstate connection, financed or insured by enterprises that do business across state lines, or bears some other *trace of interstate commerce*.⁴³

In order to avoid having to address the "grave and doubtful question" about whether Congress's Commerce Clause regulatory powers could reach matters with only a "trace" of a connection to interstate commerce, the Court applied the "constitutional doubt" canon of statutory construction and interpreted the arson statute to require more than the "minimal" commerce nexus proposed by the Government in *Jones*.⁴⁴

private residence in the present case is constitutional"). The Court ultimately avoided having to strike down the statute as applied to private residences by interpreting it in a manner that avoided the "grave and doubtful question" about whether its application to private residences would be unconstitutional. *See Jones v. U.S.*, 529 U.S. 848 (2000).

41. That statute provides:

Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years. . . .

18 U.S.C. § 844(i) (Supp. V 1999).

42. *Jones*, 529 U.S. at 856-58.

43. *Id.* at 857 (emphasis added).

44. *Id.* at 857-58.

In *United States v. Morrison*,⁴⁵ the Supreme Court held that the Violence Against Women Act⁴⁶—which authorized federal civil rights actions by women who were sexually assaulted—exceeded Congress’s power under the Commerce Clause. The Court expressly held that Congress cannot constitutionally regulate *intrastate* non-economic criminal conduct without a “substantial” effect on interstate commerce, even if such conduct, when considered in the “aggregate” along with other such conduct nationwide, would have such an effect:

We accordingly reject the argument that Congress may regulate noneconomic violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local. In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.⁴⁷

Armed with *Jones* and *Morrison*, defendants convicted under 18 U.S.C. § 922(g) renewed their constitutional attacks. To date, although no federal court of appeals has shown any interest in revisiting the issue of whether *Jones* and *Morrison* have undermined *Scarborough*,⁴⁸ a recent decision by a federal district court has thrown down the gauntlet. In *United States v.*

45. 529 U. S. 598 (2000).

46. 42 U.S.C. § 13981 (1994).

47. *Morrison*, at 617 (citations omitted).

48. See e.g. *U.S. v. Daugherty*, 264 F.3d 513, (5th Cir. 2001); *U.S. v. Santiago*, 238 F.3d 213, 216 (2d Cir. 2001). Such cases have attempted to distinguish *Jones*’s reasoning from *Scarborough*’s broad interpretation of 18 U.S.C. § 922(g) on the ground that the arson statute’s jurisdictional element required a burned building to be “used in” interstate commerce, while § 922(g) only requires a firearm to have been possessed “in or affecting” interstate commerce. See e.g. *Santiago*, 238 F.3d at 216. Such a distinction based on differences in statutory language is one without a meaningful difference, however, because the Government’s proposed interpretation of the arson statute in *Jones* was a “minimal nexus” requirement, i.e., that a building’s components had traveled across state lines at some point in the past, however remote. As discussed above, the Supreme Court in *Jones* stated that such a sweeping exercise of Congress’s Commerce Clause power raised grave constitutional doubts. See *supra* n. 42 and accompanying text (summarizing the Supreme Court’s response to the government’s position in *Jones*).

Coward,⁴⁹ Eastern District of Pennsylvania District Court Judge Stewart Dalzell, although finding himself bound by Third Circuit Court of Appeals precedent that has continued to follow *Scarborough*, asked the appellate court to reverse the defendant's conviction under 18 U.S.C. § 922(g). In so doing, Judge Dalzell highlighted *Scarborough*'s "legal fiction":

Scarborough may fairly be read to establish the legal fiction that has prevailed in these cases since it was announced. . . . Simply phrased, *Scarborough*'s legal fiction is that the transport of a weapon in interstate commerce, however remote in the distant past, gives its present intrastate possession sufficient interstate aspect to fall within the ambit of the statute. This fiction is indelible and lasts as long as the gun can shoot. Thus, a felon who has always kept his father's World War II trophy Luger in his bedroom has the weapon "in" [or "affecting"] commerce.⁵⁰

Focusing on *Jones*'s strong suggestion that more than the past interstate movement of components of a private residence is required for a constitutional application of the arson statute and *Morrison*'s clear statement that Congress cannot constitutionally regulate mere intrastate "non-economic" criminal conduct, Judge Dalzell concluded that the "*Scarborough* fiction" was constitutionally moribund.⁵¹

IV. *SCARBOROUGH* AND ITS DRAMATIC IMPLICATIONS FOR PERVASIVE FEDERAL FIREARMS REGULATION

During a recent federal prosecution under 18 U.S.C. § 922(g) in Houston, Texas, the Government's own expert witness⁵² on firearm manufacturing and distribution admitted that approximately 95 percent of all firearms in the United States—with all fifty states considered "in the aggregate"—have been "imported into the state [in which they are present]

49. 151 F. Supp. 2d 544 (E.D. Pa. 2001).

50. *Id.* at 549 (citations omitted).

51. *Id.* at 549-55.

52. That expert, George Michael Taylor, was a senior Special Agent of the Bureau of Alcohol, Tobacco and Firearms ("ATF"). Agent Taylor, a thirty-year veteran of the ATF, has testified as an expert for the ATF in countless federal firearms prosecutions.

across the state line[s].”⁵³ Such evidence of the huge number of firearms in this country that have crossed state lines is highly relevant in assessing whether *Scarborough* survives *Lopez* and its progeny.

Just as the undisputed fact in *Jones* that “[p]ractically every building in our cities, towns, and rural areas is constructed with supplies that have moved in interstate commerce” cast serious “constitutional doubt” on the application of the federal arson statute to private residences,⁵⁴ the evidence of the huge percentage of firearms in this country that has crossed state lines casts similar doubt on *Scarborough*’s interpretation of 18 U.S.C. § 922(g).⁵⁵ Under *Scarborough*, “hardly a [firearm] in the land would fall outside [§ 922(g)’s] domain.”⁵⁶ The evidence of the number of firearms that have crossed states lines is also relevant insofar as the Supreme Court in *Lopez* suggested that the felon-in-possession statute should be interpreted to “reach to a discrete set of firearm possessions that . . . have an explicit connection with or effect on interstate commerce.”⁵⁷ Ninety-five percent of all firearms in this country cannot fairly be considered a “discrete set.”

In interpreting § 922(g), courts must keep in mind that the statute’s interstate commerce element is based on a particular *firearm*’s “nexus” with interstate commerce—not on a *felon*’s “nexus” with interstate commerce.⁵⁸ Indeed, a felon’s

53. Special Agent Taylor testified that, with respect to “the country as a whole . . . about 5 percent of the guns in the average state [in] the country were [manufactured within that state]; 95 percent would be imported into the state across the state line.” Tr. R., Vol. 5, at 47, *U.S. v. Ramoune Lanier Johnson*, Cr. No. H-00-733 (S.D. Tex.—Houston Div.) (Jan. 9, 2001). According to Special Agent Taylor, in certain of the fifty states—e.g., Connecticut and New York, where major firearms manufacturers, such as Winchester, are located—considerably less than 95 percent of all firearms possessed within the state’s borders were manufactured out-of-state. *Id.* Special Agent Taylor’s 95% estimate was based on the fifty states considered in the “aggregate.” *Id.*

54. *Jones*, 529 U.S. at 857.

55. In the past, without actually having such evidence before them, certain judges have taken judicial notice that “few guns have never crossed a state line.” *Kirk*, 105 F.3d at 1005 (Higginbotham, J., concurring, joined by Politz, C.J., Davis & Wiener, JJ.).

56. *Jones*, 529 U.S. at 857.

57. *U.S. v. Lopez*, 514 U.S. 549, 562 (1995) (emphasis added).

58. Any argument that § 922(g)’s application to a felon’s mere intrastate possession of firearm could be upheld based on the aggregate effect of all felons’ possessions of firearms would be foreclosed by *U.S. v. Morrison*, 529 U.S. 598, 617 (2000) (“We . . . reject the

possession of a firearm that has never crossed state lines is not an offense under § 922(g).⁵⁹ With this in mind, under *Scarborough's* grant of regulatory authority under the Commerce Clause, Congress presumably could enact a statute that criminalizes *anyone's* purely local possession of a firearm that, at some point in the past, had crossed state lines and, thus, "affected" commerce.⁶⁰ The suggestion that Congress has the jurisdiction under the Commerce Clause to criminalize *all* citizens' possessions of 95 percent of firearms in this country surely would cause tremendous concern among federal judges who believe in preserving our constitutional system of federalism.

Yet the *Scarborough* theory of interstate commerce jurisdiction, although it only applies to felons' possessions of firearms, nevertheless rests on this fallacious reasoning. The mere fact that § 922(g) is aimed only at felons and other prohibited classes of persons does not mean that its jurisdictional element (as interpreted by *Scarborough*) is somehow constitutionally valid. As noted, the statute is based on a firearm's nexus to interstate commerce, not a felon's nexus to interstate commerce.

V. CONCLUSION

For reasons that are not entirely clear, the Supreme Court to date has not granted certiorari in order to resolve the irreconcilable conflict between its 1977 decision in *Scarborough* and its subsequent decisions in *Lopez* and its progeny—the latter of which clearly undermine the "*Scarborough* fiction." Although typically the Supreme Court requires a circuit conflict on an issue before certiorari will be granted,⁶¹ the lack of such a circuit conflict regarding the proper interpretation of 18 U.S.C. § 922(g) is not a valid basis for foregoing review any longer. As

argument that Congress may regulate noneconomic . . . criminal conduct based solely on that conduct's aggregate effect on interstate commerce.").

59. 18 U.S.C. § 921(a)(2) (1994).

60. *Kirk*, 105 F.3d at 1005 (noting that the *Scarborough* theory of federal jurisdiction would authorize "congressional power to outlaw possession of guns in general") (Higginbotham, J., concurring, joined by Politz, C.J., Davis & Wiener, JJ.).

61. Sup. Ct. R. 10(a) (1999).

noted above, each federal circuit to have addressed the issue has held that, as an intermediate appellate court, it has no power to “overrule” *Scarborough*. Therefore, very likely there never will be a circuit split on this issue. Moreover, the Supreme Court’s own rules provide that, even without a circuit split, a clear conflict between its own prior decisions is a basis to grant certiorari and resolve the conflict.⁶²

Scarborough cannot logically survive the Court’s recent shift in its Commerce Clause jurisprudence.⁶³ Although it may not be popular in this “conservative” era of strict law enforcement for the Court to significantly narrow the scope of 18 U.S.C. § 922(g),⁶⁴ an intellectually honest adherence to the “conservative” principles of federalism followed in *Lopez* and its progeny requires nothing less.⁶⁵

62. Sup. Ct. R. 10(c).

63. This article does not intend to suggest that 18 U.S.C. § 922(g) is facially unconstitutional. Rather, the language of the firearm statute, like the arson statute at issue in *Jones*, simply must be interpreted in a manner consistent with the limits of Congress’s power under the Commerce Clause. Such an interpretation must require more of an “effect” on interstate commerce than the fact that a firearm crossed state lines at some point in the past.

64. It should be noted that the dramatic reduction in federal prosecutions of felons who possess firearms that would result from an overruling of *Scarborough* would not permit felons to possess firearms with impunity. As noted above, state laws already prohibit felons from possessing firearms. Congress, consistent with the Constitution, could simply provide federal funds to states to implement their own “Project Exile” programs.

65. “The Judicial Branch derives its legitimacy, not from following public opinion, but from deciding by its best lights whether legislative enactments of the popular branches of Government comport with the Constitution.” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 963 (1992) (Rehnquist, C.J., concurring in part and dissenting in part, joined by White, Scalia & Thomas, JJ.).